



# THE EMPLOYMENT TRIBUNAL

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**SITTING AT:** LONDON SOUTH

**BEFORE:** EMPLOYMENT JUDGE MORTON

**BETWEEN:**

Mr A Pirzada

Claimant

AND

HY Education Limited trading as Apex College

Respondent

**ON:** 20 March 2019

**Appearances:**

**For the Claimant:** In person

**For the Respondent:** Mr H Slater (Director)

## **WRITTEN REASONS PRODUCED PURSUANT TO A REQUEST BY THE RESPONDENT**

1. By a claim form presented on 22 March 2018 the Claimant presented to the tribunal a claim of breach of contract arising from a short period of employment with the Respondent. At the hearing on 20 March I gave an oral judgment to the effect that the Claimant's claim of breach of contract succeeded and that he was entitled to one month's net notice pay. The Respondent made an application for written reasons and although this was made outside the normal 14 day time limit I agreed to extend time on the basis that the endorsement informing the parties that written reasons could be requested within 14 days of the judgment being sent to the parties had been omitted from the written judgment.
2. At the hearing I heard evidence from the Claimant and from Mr Slater, Director of the Respondent. I was referred to a small number of documents.

The brief facts of the case were that the Claimant was engaged by the Respondent to teach at the College and to act as Programme Director for one of the College's HND courses. There was an exchange of correspondence about the terms on which the Claimant would teach and a draft contract changed hands via email on 28 December 2017. More details of the contract are given below in paragraph 7.

3. The Claimant began to teach at the College and on or about 21 February 2018 took a class with some students who then made a complaint to Mr Slater about the manner in which the class had been conducted. Mr Slater took some notes based on what the students had said to him and then put the matter to the Claimant by email. Although the Claimant's reply disputed that the students' concerns were warranted Mr Slater disagreed and brought the Claimant's contract to an end with immediate effect and without payment in lieu of notice on the basis that he considered that the Claimant's conduct of the class amounted to gross misconduct, thus disentitling the Claimant to notice. The Claimant subsequently brought a claim to the Tribunal for his notice pay.
4. I explained to the parties the relevant law and the issues I would need to decide in considering the Claimant's claim. Claims of breach of contract may be brought under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623 Article 3 of which provides:

**"Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if-**

**(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;**

**(b) the claim is not one to which article 5 applies; and**

**(c) the claim arises or is outstanding on the termination of the employee's employment."**

5. I will deal with each issue in turn, setting out the facts as I found them and my conclusion on the legal issue.
6. **Was the Claimant at the material time an employee?** This point is significant because if he was not I would have had no jurisdiction to hear the claim. I heard evidence about how the Claimant was engaged by the Respondent and saw the relevant email exchanges. On the basis of that evidence I found that the Claimant was an employee at the material time. It was the Respondent's clear intention to engage the Claimant as an employed Programme Director, integrated into its organisation, on the terms set out in a document headed "Contract of Employment".
7. **What were the terms of his employment?** A draft document had been sent to the Claimant by Mr Slater and there was then a meeting on 1 January 2018 at which various terms were discussed including salary and job title. Following

that meeting the Respondent sent the Claimant a revised contract. I find that in doing so it made a firm offer to employ him on the terms set out in the contract and that as there were no further matters to negotiate the agreement was no longer in draft form as the Respondent suggested. The Claimant accepted the offer by his email at 7.48 pm in which he states "Thanks Howard. That's all fine. See you on 15<sup>th</sup>". It was plain from the correspondence leading to this exchange that the Claimant intended his employment to be governed by clear contractual terms, in this instance terms that created an employment relationship. I took into consideration the fact that the Claimant was paid gross for the short period of his employment, but that does not in itself displace my conclusion that by an email dated 2 January 2018 the Claimant accepted an offer of employment with the Respondent. His employment then commenced on 15 January. I did not accept that on these facts that Claimant was working on a self-employed basis at the time that his contract was terminated, as the Respondent submitted.

8. **Did the employment contract confer an entitlement to notice?** Yes – there was a clause in the contract entitling him to one month's notice after a month's employment, unless he was dismissed for gross misconduct.
9. **Did the Claimant behave in a way that amounted to gross misconduct thereby disentitling him to notice?** The burden of showing this rested on the Respondent. The question in a breach of contract case is not one of whether Mr Slater reasonably believed there to have been gross misconduct but whether on a balance of probabilities there was in fact conduct on the part of the Claimant that went to the root of the contract and thereby justified a summary dismissal.
10. In my judgment the Respondent did not show a balance of probabilities that the Claimant had been guilty of gross misconduct for the following reasons:
  - a. It did not produced any documents explaining how the contract of employment defined gross misconduct;
  - b. The decision to dismiss was taken by Mr Slater after hearing complaints from students. He himself did not witness the events. He did not produce to the tribunal any contemporaneous account of the event by anyone actually present. Instead he has produced a summary of events, signed by a number of students, but which he accepted was written by him. It was not dated. It was materially at odds with the account given by the Claimant in certain key respects.
  - c. Whilst the students' concerns were evidently grave enough to provoke them into complaining and refusing to be taught by the Claimant again, it was not clear from contemporaneous documents exactly what their concerns were or whether they were sufficiently grave to amount to a repudiatory breach of contract by the Claimant. The lack of a definition of gross misconduct exacerbated this difficulty.
  - d. Whilst it is the case that a lack of due process is generally more

relevant in an unfair dismissal case, it has some relevance where an employer needs to prove on a balance of probabilities that a particular event happened or particular behaviour occurred. In this case there was a complete of procedure preceding the dismissal. There was merely an exchange of emails – no face to face meeting took place.

- e. It is clear from the dismissal email that uppermost in Mr Slater's mind, was the College's reputation and the potential for damaging reports being made to inspectors by fee paying students. Whilst his conduct in deciding to minimise that risk was understandable in the circumstances, that does not mean that he was entitled to terminate the Claimant's contract without notice. Nor was that necessary to protect the College's reputation – a payment in lieu of notice could have been made. This was not an unfair dismissal case in which I was reviewing the reasonableness of the employer's conduct. In a breach of contract case the question is an objective one – was there repudiatory conduct by the employee that justified a summary termination. In my judgment the Respondent did not produce sufficient evidence to show that that was the case.

- 11. I was satisfied that the Claimant was an employee and that I had jurisdiction to determine his complaint. I was not satisfied that he was guilty of gross misconduct. The Respondent therefore breached his contract by terminating it without notice and the Tribunal had jurisdiction to award him damages for breach of contract amounting to one month's net pay.

Employment Judge Morton  
Date: 2 July 2019